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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

COUNTY OF TUOLUMNE

ON APPEALS FROM THE CALIFORNIA COURT OF APPEAL, FIFTH APPELLATE DISTRICT

BRIEF FOR THE APPELLANTS

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OPINIONS BELOW

County of Fresno. The findings of fact, conclusions of law, and memorandum of decision of the California Superior Court (J.S. App. A 1a-14a) are not reported. The opinion of the California Court of Appeal, Fifth Appellate District (J.S. App. B 61a-71a), is reported at 50 Cal. App. 3d 633.

County of Tuolumne. The findings of fact, conclusions of law, and memorandum of opinion of the

California Superior Court (J.S. App. A 19a-56a) are not reported. The opinion of the California Court of Appeal, Fifth Appellate District (J.S. App. B 72a-73a) is not reported.

JURISDICTION

The judgments of the California Court of Appeal in these cases (J.S. App. B 71a, 72a-73a; J.S. App. C 74a-77a) were entered on August 13, 1975. The California Supreme Court denied timely petitions for hearing on October 9, 1975 (J.S. App. D 78a-79a). Notices of appeal to this Court were filed on January 6, 1976 (J.S. App. E 80a-83a).[1] By order dated December 30, 1975, the Chief Justice extended the time for docketing these appeals to and including March 7, 1976. The appeals were filed on March 5, 1976, and probable jurisdiction was noted on May 19, 1976 (A. 289).

The California Court of Appeal held that the imposition of a state possessory interest tax upon the occupancy by employees of the United States Forest Service of government-provided housing quarters located in national forests did not violate the Supremacy Clause of the United States Constitution. The jurisdiction of this Court is conferred by 28 U.S.C. 1257(2), which authorizes a direct appeal to this Court from the final judgment by the highest court of a state in which a decision could be had where the constitutionality of a state statute is drawn into question and

[1] Notices of appeal were filed in both the California Court of Appeal (J.S. App. E 80a-83a) and in the California Superior Courts (J.S. App. F 84a-87a) because of uncertainty as to the location of the record. In the *County of Fresno* case, the notice of appeal was filed in the Superior Court on January 7, 1976.

the decision is in favor of its validity. See, *e.g., Agricultural Bank* v. *Tax Commission,* 392 U.S. 339; *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Article VI of the United States Constitution, 5 U.S.C. 5911, 16 U.S.C. 500, and Sections 102-104, 107 and 201 of the California Revenue and Taxation Code (West 1970) are set forth in the Appendix, *infra,* pp. 27-32.

QUESTION PRESENTED

Whether the imposition of the California annual tax on possessory interests in improvements on tax-exempt land based upon the value of the occupancy rights of employees of the United States Forest Service in government-owned housing located within national forests and assigned to them to occupy in connection with their official duties violates the immunity of the United States from state taxation provided by the Supremacy Clause of the Constitution.

STATEMENT

1. The United States Department of Agriculture is responsible for executing the laws affecting the public lands reserved as national forests. See 16 U.S.C. 471 and 472. Pursuant to 16 U.S.C. 480, the civil and criminal jurisdiction of the states within such national forests is not affected. In order to protect and administer the national forests, the Forest Service of the Department of Agriculture has constructed housing quarters within the national forests which it assigns

to Forest Service employees to occupy in connection with their duties. The assignment of federal employees to such quarters is authorized by 5 U.S.C. 5911(b) "when conditions of employment or of availability of quarters warrant the action" (J.S. App. A 1a, 3a-4a, 9a-10a, 24a, 31a, 43a).

The individual appellants are employees of the Forest Service who were assigned to duty stations in the Sierra, Sequoia, and Stanislaus National Forests, which are located in Fresno and Tuolumne Counties in California. In connection with their duties of protecting, maintaining, and administering the national forests, appellants were assigned to occupy government-owned housing located within these three national forests. The housing ranged from one-bedroom to three-bedroom units and many of them were in remote areas of the national forests (J.S. App. A 1a-3a, 9a-11a, 20a-21a, 24a-25a, 30a, 43a, 50a-51a; A. 4, 11, 15, 213, 221).

In accordance with the criteria set forth in 5 U.S.C. 5911, the Bureau of the Budget Revised Circular No. A-45 (Pltf. Exh. 1, A. 123-139),[2] and the Forest Service Manual (Pltf. Exhs. 2, 3, A. 140-189), the Forest Service unilaterally made the housing assignments of its employees solely on the basis of its needs. Because there are more Forest Service employees than such housing, every such facility was occupied. The Forest Service employees assigned to the quarters located within the national forests were charged an occupancy

[2] "Pltf. Exh." refers to the plaintiff's exhibits in the *Fresno County* Case. The Plaintiff's Exhibits 1, 2, and 3 (A. 123-189) in the *Fresno County* case were respectively admitted as Plaintiff's Exhibits 5, 3, and 4 in the *Tuolumne County* case (A. 227-228, 288) but have not been separately reproduced in the appendix.

fee. The fee was computed in accordance with an official schedule that took into account the number of amenities provided by the facility and its distance from an established community (J.S. App. A 1a-3a, 12a, 27a-30a, 44a, 51a; J.S. App. B 63a; A. 21-23, 28-33, 48-50, 53, 63, 67, 70, 72, 75, 85, 87; Pltf. Exh. 1, A. 123-139; Pltf. Exh. 2, A. 140-141, 144-165; Pltf. Exh. 3, A. 172-185; A. 231-235, 244-245, 253, 255). The fee was based upon the number of days of occupancy during the preceding pay period and was withheld from the employees' bi-weekly pay checks (J.S. App. A 2a-4a, 31a, 45a; J.S. App. B 63a; A. 30, 49, 120, 235-236).

The Forest Service housing assignments are of two types: (1) required occupancy, and (2) permissive occupancy. With respect to required occupancy, 5 U.S.C. 5911(e) provides that "[t]he head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise" (see Pltf. Exh. 2, A. 142). In accordance with this statutory directive, the Forest Service Manual authorizes Forest Supervisors to require specific employees to occupy specific Government quarters "only when there is no other way to acquire a specific service or that Government property cannot be adequately protected" (J.S. App. A 28a; Pltf. Exh. 3, A. 167).

The Forest Service Manual further provides that an employee will be required to occupy government-owned housing quarters if his occupancy is necessary to: (a) provide service to the public; (b) protect natural resources; (c) operate necessary equipment; and (d) pro-

tect government property in special situations. Examples of the types of employees in these categories are recreation aides at heavily used remote areas, log scalers and those controlling the movement of logs, fire control personnel who either need to be immediately available for fire suppression duties or who are stationed at specific locations according to an approved fire plan, and certain employees at nursery or research installations. In addition, Regional Foresters and Experiment Station Directors are authorized to require occupancy for certain employees who are assigned custodial duties (J.S. App. A 3a-4a, 30a-31a; J.S. App. B 63a; A. 37-38, 40; Pltf. Exh. 2, A. 143; A. 234).

The Forest Service also provides housing quarters for its employees on a permissive occupancy basis. As in the case of required occupancy housing, such facilities are provided because suitable privately-owned quarters are not available in many of the remote areas in the national forests. Permissive occupancy of government-owned dwellings is ordinarily limited to short-term fire control employees, district rangers, nurserymen, timber-sale officers, forest supervisors and staff. Permissive occupancy assignments of housing quarters are made by the Forest Service on the basis of a "most efficient use" policy (J.S. App. A 2a, 11a, 31a, 44a; J.S. App. B 63a; A. 40, 141).

The most significant factors taken into account in determining the most efficient use of a particular housing unit are the relative position of the employee and the established use of the facility. For example, certain dwellings are set aside for district fire control officers and such employees would have priority in the assignment of those quarters. An employee who is entitled

because of his position to housing on a permissive occupancy basis may decline the assignment only if his Forest Supervisor will agree to let another employee live in the dwelling. Other employees may decline permissive occupancy housing assignments. However, the Forest Service requires that each dwelling unit be occupied by one of its employees (J.S. App. A 31a, 33a, 43a-44a; J.S. App. B 63a; A. 40-42, 88-89, 236, 247-248).

The assignment of housing with respect to both required and permissive occupancy quarters is dictated by the needs of the Forest Service. The employees have no right to participate in the assignment decisions. Thus, the conditions of occupancy for all Forest Service employees are subject to the identical restrictions whether a housing assignment originates on a required or permissive occupancy basis. (J.S. App. A 1a-5a, 11a, 36a-37a, 43a; A. 63, 72, 235, 248, 253, 284).

The privacy of the Forest Service employees occupying the government-owned housing quarters is severely diminished. The Forest Service retains full rights of access to these dwellings. The units are locked by Forest Service locks, which can be opened by a single Forest Service master key to which all Forest Service employees have access. Forest Service officers are permitted to enter these quarters at any time to check on their maintenance and are at liberty to station additional personnel in the quarters if conditions make it necessary. For example, one fire control technician testified that during an emergency nine additional people were stationed in his house on one hour's notice. Finally, the public is authorized to visit Forest Service employees at their housing quarters when other Forest

Service facilities are closed (J.S. App. A 2a, 4a, 5a, 11a, 32a-35a, 38a-39a, 44a, 53a; J.S. App. B 63a-64a; A. 43-44, 46-47, 57-58, 64-65, 69, 74, 79, 81, 84-87, 104, 238-239, 242-243, 245, 249-253, 256-262, 264-265, 267-268, 270-271, 277, 280).

Forest Service employees have no fixed right to the particular housing they occupy, whether their assignment is on a required or permissive occupancy basis. There is no written lease or other document between the employees occupying such quarters and the Forest Service. The employees' occupancy is immediately terminable at any time without any prior notice by the Forest Service. The employees have no right to sublet or to assign their right of occupancy and are permitted to make repairs, alterations, or modifications to the units only with the consent of their superiors. Pursuant to Section 0.735-11(p) of the Forest Service Regulations (7 C.F.R. (1971)), the employees are prohibited from using the quarters "for other than officially approved purposes" (J.S. App. A 2a, 4a-5a, 11a-12a, 31a-32a, 35a, 37a-38a, 45a, 52a-53a; J.S. App. B 63a; A. 33, 40, 43-46, 52, 53, 56, 72, 87, 234, 239-242, 244-245, 278).

2. Under Sections 103, 104, 107 and 201 of the California Revenue and Taxation Code (West 1970), the counties of California are authorized to impose an annual tax upon possessory interests in improvements on tax-exempt land. Respondents determined that the government-owned housing [3] occupied

[3] The Forest Service also leased privately-owned houses located near national forests and assigned such dwellings to its employees as in the case of government-owned housing (A. 33-37). However, respondents did not seek to tax the employees' possessory interests in such housing.

by the individual appellants in connection with their federal employment were possessory interests in improvements on tax-exempt land and were thus subject to the tax. They computed the value of the possessory interests in the improvements by computing the discounted value of the rent of a comparable dwelling (economic rent) exclusive of land and the value of the reversionary interest after the estimated period of occupancy. Respondents excluded from their calculations the value of office or other governmental areas that were open to the public and took into account the risk of termination of occupancy. After deriving two separate values based upon the capitalization of economic rent and the valuation of the property less the reversionary interest, a final appraisal was made in accordance with the judgment of the appraiser (J.S. App. A 2a, 10a, 51a; J.S. App. B 62a; A. 15-16, 95, 100-111, 205-206).[4]

The Forest Service employees paid the assessed tax [5] in 1967 under protest and filed applications for refund, which were denied by respondents' boards of supervisors sitting as boards of equalizations (J.S. App. A 2a, 10a-11a, 25a, 51a-52a). In the first of these refund suits in which the individual appellants were joined by the United States, the Superior Court of Fresno County held that the Forest Service employees had no

[4] The description of the assessor's determination of the value of the possessory interest is based upon the testimony in the *County of Fresno* case (see A. 15-16, 95, 100-111). For a description of the valuation procedures used by the County of Tuolumne, see J.S. App. A 40a-42a.

[5] The taxes imposed on the individual appellants ranged from $3.03 to $91.31 for 1967 (J.S. App. A 10a, 15a-18a, 21a, 25a, 51a, 58a-60a).

possessory interests subject to tax. The court further held that, even assuming that they had such a taxable interest, the California possessory interest tax interfered in the relationship between the Forest Service and its employees and violated the constitutional immunity of the United States and its agents from state taxation. The court also ruled that the tax unconstitutionally discriminated against the United States and its employees, and was a forbidden double tax upon the possessory interests in federal forests under Section 102 of the California Revenue and Taxation Code because the United States made payments in lieu of taxes under 16 U.S.C. 500 (J.S. App. A 4a, 6a-7a, 12a-14a). In the second case, the Superior Court of Tuolumne County held that the individual appellants had no possessory interests under California law and did not reach the other issues presented (J.S. App. A 48a, 53a-55a).

The California Court of Appeal reversed in both cases (J.S. App. B 61a-73a). It held that under California law the Forest Service employees had taxable possessory interests in the government housing quarters assigned to them and that the imposition of the tax did not violate the immunity of the United States against state taxation. In the court of appeal's view, "[a] possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the private citizen's usufructuary interest in the government land that is being taxed" (J.S. App. B 68a).

SUMMARY OF ARGUMENT

In *McCulloch* v. *Maryland,* 4 Wheat. 316, this Court first announced the doctrine that the federal government is immune from state taxation. "[U]nshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." *United States* v. *County of Allegheny,* 322 U.S. 174, 177. See also *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 117-118; *Department of Employment* v. *United States,* 385 U.S. 355; *United States* v. *Mississippi Tax Commission,* 421 U.S. 599, 612-613. Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland, supra,* 4 Wheat. at 436).

This case presents a classic violation of the *McCulloch* doctrine. The California tax upon the possessory interests of federal Forest Service employees in housing quarters assigned to them by the federal government in order to permit them to perform their duties respecting the national forests is a levy upon the activities of the United States. California could not subject the United States to a real estate tax upon the value of its ownership interest in the housing located within the national forests. While the possessory interest in those quarters of the Forest Service employees assigned to them may be conceptually distinguished from the ownership interest of the United States, the employees' occupancy of such quarters was for the sole purpose of discharging their governmental function of running the national forests. Thus, the fact that they paid rent and perhaps derived some incidental personal benefits from their occupancy does not negate that their presence in such housing was primarily for the benefit of the United States in fur-

therance of its governmental activities. A state tax on such activity violates the Supremacy Clause of the Constitution.

In upholding the tax, the court of appeals relied upon *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, *United States* v. *Township of Muskegon*, 355 U.S. 484, and *United States* v. *City of Detroit*, 355 U.S. 466. But those cases involved the distinguishable situation of a state tax upon a private contractor's use of federally-owned property in connection with its own commercial activities. Under these circumstances, the tax was upheld because the private contractor was not deemed to be an instrumentality of the United States. Here, however, the immunity we claim is the fundamental constitutional prohibition that inheres in the Supremacy Clause against direct state taxation of the functions of the federal government carried out by government employees and not the implied immunity of "private persons seeking to clothe themselves with governmental character." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 352. Under that well-established immunity of the federal government, the California tax cannot stand.

ARGUMENT

THE IMPOSITION OF THE CALIFORNIA POSSESSORY INTEREST TAX UPON THE OCCUPANCY RIGHTS OF FEDERAL EMPLOYEES IN GOVERNMENT-OWNED HOUSING QUARTERS ASSIGNED TO THEM TO OCCUPY IN CONNECTION WITH THEIR DUTIES VIOLATES THE CONSTITUTIONAL IMMUNITY OF THE UNITED STATES FROM STATE TAXATION

A. INTRODUCTION

"[S]ince 1819, when Chief Justice Marshall in * * * [*McCulloch* v. *Maryland*, 4 Wheat. 316] expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application." *United States* v. *County of Allegheny*, 322 U.S. 174, 176. In determining the reaches of that constitutional immunity, the Court has often considered whether property belonged to the United States under particular arrangements with private parties or whether particular entities were federal instrumentalities. "But unshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation" (*id.* at 177). See also *Kern-Limerick, Inc.*. v. *Scurlock*, 347 U.S. 110, 117-118; *Department of Employment* v. *United States*, 385 U.S. 355, 358-359; *First Agricultural Bank* v. *State Tax Commission*, 392 U.S. 339, 340; *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 612-613. Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland, supra*, 4 Wheat. at 436.

This case involves an application of a state tax to the activities of the federal government itself and not to a private contractor acting on behalf of the federal government. Thus, the immunity we claim here is the fundamental constitutional prohibition against direct state taxation of the functions of the federal govern-

ment carried out by government employees and not the implied immunity of "private persons seeking to clothe themselves with governmental character." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 352. Just as the celebrated *McCulloch* decision established that the State of Maryland could not impose a stamp tax upon the circulation of currency by the Second Bank of the United States, the California county tax upon the occupancy of Forest Service employees in housing owned and assigned to them by the federal government is likewise an unconstitutional levy upon the United States.

The tax immunity of the United States covers the Forest Service and its personnel. While the Court has employed various formulations to determine whether institutions or individuals have governmental immunity (see, *e.g.*, *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485. See also *United States* v. *Boyd*, 378 U.S. 39, 48; *Department of Employment* v. *United States*, *supra*, 385 U.S. at 358-359), the Forest Service is entitled to immunity from state taxation as an integral part of the government itself. It is therefore beyond question that appellees Fresno and Tuolumne Counties could not subject the United States to a real property tax upon either the value of the land encompassing the national forests within their borders or the value of its ownership interest in the housing located within the national forests. While the possessory interests of the Forest Service employees in the housing units assigned to them may be conceptually distinct from the ownership interest of the United States, the occupancy of such quarters by the Forest Service personnel was for

the sole purpose of discharging their governmental function of running the national forests. As we shall now demonstrate, the assignment of such housing was an activity of the federal government which the states are forbidden to tax as a consequence of the Supremacy Clause.[6]

B. THE CALIFORNIA TAX IS AN UNCONSTITUTIONAL LEVY UPON THE ACTIVITIES OF THE FEDERAL GOVERNMENT

1. Article IV, Section 3, of the Constitution empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." In the exercise of this constitutional authority, Congress has made the Department of Agriculture responsible for executing the laws affecting the public lands reserved as national forests. See 16 U.S.C. 471 and 472. In order to protect and administer the national forests, the Forest Service has constructed housing quarters throughout these areas which it requires its employees to occupy. By so doing, the Forest Service is able to maintain constant surveillance over these natural preserves in order to protect them against fire or other calamity and to serve the public for whose enjoyment the national forests were set aside. The assignment of federal employees

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[6] In our Jurisdictional Statement (pp. 13-14), we also argued that the possessory interest tax unlawfully discriminated against the United States and its employees. However, after consulting with officials of the California Department of Conservation and its personnel assigned to the State forests, we have concluded that there is no present factual basis to the discrimination claim. We therefore no longer advance the argument that the tax discriminated against the federal government.

to such dwelling units is authorized by 5 U.S.C. 5911 (b) "when conditions of employment or of availability of quarters warrant the action" (Appendix, *infra,* p. 28).

Here, Forest Service employees were assigned to occupy government-owned housing quarters in national forests located within appellee Counties of Fresno and Tuolumne in California. Those assignments were made unilaterally by the Forest Service solely on the basis of its needs in accordance with the criteria set forth in 5 U.S.C. 5911, and Bureau of the Budget and Forest Service policy directives. Certain Forest Service employees were required to occupy such quarters after it was determined "that necessary service [could] not be rendered, or that property of the Government [could] not adequately be protected, otherwise" (5 U.S.C. 5911 (e), Appendix, *infra,* pp. 29-30). Other employees were assigned to such quarters (unless they could find a substitute) because of their status or as a result of the Forest Service's policy that required each dwelling to be occupied.

Apart from these differences in how a housing assignment originated, all of the Forest Service employees' rights in their dwellings were subject to the identical restrictions. The employees were prohibited from using the quarters "for other than officially approved purposes" (7 C.F.R. 0.735-11(p) (1971)). Their occupancy was immediately terminable at any time without any prior notice by the Forest Service, and additional employees could be assigned to a dwelling unit with no advance notice in an emergency. Moreover, the employees' superiors had full access to the housing quarters because the units were locked by Forest

Service locks which could be opened by a single master key. Finally, the public was authorized to call upon these personnel in their quarters when other Forest Service facilities were closed, for the purpose of receiving assistance.

This undisputed summary description of the Forest Service employees' rights in the housing quarters confirms that their occupancy arose out of their status as government employees and was solely for the purpose of enabling them to protect and administer the national forests. Indeed, the closest analogy to the Forest Service's system of linking the housing and duty stations of its employees is the deployment by the armed forces of personnel to the various military installations upon which the government maintains similar housing facilities. In both cases, the process of assigning personnel must be administered with maximum flexibility in order to meet exigent circumstances and the assignment of housing is dictated by the nature and location of the employee's duty station.

Moreover, the continuous nature of the duties of the armed forces and the Forest Service render the housing units of their personnel essentially supplementary duty stations. Finally, like the members of the armed forces, the employees of the Forest Service are engaged in the public service and Congress has determined by the enactment of 5 U.S.C. 5911 that the provision of housing to them is necessary to insure the effective performance of their functions. See *United States* v. *Phisterer,* 94 U.S. 219, 224; *Jones* v. *United States,* 60 Ct. Cl. 552, 570, 574.

Once it is recognized that the assignment of the housing to Forest Service personnel is in furtherance

of the discharge of their public duties, the error of the California Court of Appeal in upholding a state possessory interest tax upon their occupancy rights in such quarters becomes readily apparent. If, as the decision below held, the states could levy such a tax, they could effectively impose conditions upon the residence of Forest Service personnel in the national forests within their borders and thereby interfere with the federal program of protecting the national forests. See *Van Brocklin* v. *Tennessee,* 117 U.S. 151, 179; *Mayo* v. *United States,* 319 U.S. 441, 447. Our system of federalism therefore wisely rejects such taxation of the national government by its constituent parts. Cf. *Crandall* v. *State of Nevada,* 6 Wall. 35, 43-49.

To be sure, the value of the possessory interests might be mathematically carved out of the concededly tax-exempt ownership interests of the United States, as the tax assessors attempted to do in these cases (see A. 15-16, 95, 100-111; J.S. App. A 40a-42a). But the federal government created these possessory interests for the sole purpose of protecting and administering the national forests. There is accordingly no constitutionally permissible way to isolate any "personal residence" portion of these possessory interests that could be deemed to be unrelated to the official duties of these Forest Service employees.

They were expected to maintain constant watch over the national forests and their occupancy of these quarters was solely to enable them to do so. The fact that they paid rent and perhaps derived some incidental personal benefits from their occupancy does not justify a state tax upon their possessory interests when their presence in such housing was primarily for the benefit of the United States.

Indeed, the existence of such indirect personal benefits to government employees cannot support the imposition of a state tax upon the activities of the federal government in the face of the absolute constitutional prohibition against such state interference. For example, the members of the armed forces wear government-issued uniforms in the performance of their duties. But no one would suggest that a state could levy a use tax upon those who wear such uniforms even though the uniforms also serve the personal clothing needs of the wearer. The relationship of uniforms to the performance of military duties is inseparable from the personal benefits that may be derived from their use. A state tax upon soldiers' use of military uniforms would be an unconstitutional levy upon the activities of the federal government.

Similarly, here, the imposition of the California tax on the value of the occupancy rights of federal employees stationed in the national forests is barred by the tax immunity of the United States provided by the Supremacy Clause. As this Court observed almost a century ago in *Van Brocklin* v. *Tennessee, supra,* 117 U.S. at 155-156, "[t]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[7]

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[7] *Van Brocklin* held that all property owned by the United States was exempt from state taxation, even though the State had not acquiesced in the federal acquisition of the property nor ceded exclusive jurisdiction to the United States. Significantly, the

2. a. The decisions of the Court confirm the foregoing analysis. For almost a century, the Court has consistently rejected attempts by the states to tax property to which the United States held title but chose to place in the hands of individuals for the purpose of carrying out a government program. In *United States* v. *Rickert,* 188 U.S. 432, the Court held that improvements made upon lands belonging to the United States but which were put in possession of Indians for their benefit remained immune from state taxation and that cattle, horses and chattels purchased by the federal government and "put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them" (*id.* at 444) were likewise immune from state taxation.[8]

Similarly, in *Irwin* v. *Wright,* 258 U.S. 219, the Court prohibited state taxation of lands owned by the federal government and occupied by homestead entry-

Court in *Van Brocklin* (117 U.S. at 169) expressed doubt as to the correctness of *People* v. *Shearer,* 30 Cal. 645, upon which appellees rely (Motion to Dismiss or Affirm, pp. 4, 9).

[8] *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, upon which appellees rely (Motion to Dismiss or Affirm, pp. 6-7), is distinguishable. There, the Court upheld a state gross receipts tax on a ski resort operated by an Indian tribe on off-reservation land that the tribe leased from the federal government. Although Section 5 of the Indian Reorganization Act (48 Stat. 985, 25 U.S.C. 465) exempted the land from state and local taxation, the Court held that neither the statute nor the federal immunity doctrine bars taxing income from the land. In that context, the tribe was acting as a private entrepreneur. However, the Court further ruled that the statute prohibited the imposition of a state use tax on personalty that the tribe purchased out of state and which was installed as a permanent improvement on the land so as to become part of the land itself. But cf. *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, holding that a state has no power to tax income of Indians wholly derived from reservation sources.

men who were in the process of clearing the land and making it arable in order to qualify for title to the tracts they reclaimed by their efforts. Cf. *S. R. A., Inc.* v. *Minnesota,* 327 U.S. 558, 566-570. Finally, in *United States* v. *County of Allegheny, supra,* the Court struck down a state *ad valorem* personal property tax on machinery owned by the federal government and leased to a private party for the purpose of permitting it to manufacture military ordnance under a government contract. The fact that the federal government had placed its property in the hands of a private contractor did not permit the state to tax the property as if it belonged to the private contractor.

This case follows *a fortiori* from these decisions. For if the states cannot tax federally-owned property which is held by a private party in order to carry out a federal program, they cannot tax property of the United States held by federal employees for the purpose of discharging their official duties. The Forest Service and its employees perform "functions indispensable to the workings" of the government and are therefore nothing less than "an arm of the Government" itself. *Department of Employment* v. *United States, supra,* 385 U.S. at 359-360. Under such circumstances, the occupancy rights of the Forest Service employees in their assigned housing quarters are immune from state taxation.

b. Although the California Court of Appeal acknowledged the force of the federal tax immunity doctrine, it held that it was inapplicable here because "[a] possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the pri-

vate citizen's usufructuary interest in the government land and improvements alone that is being taxed" (J.S. App. B 68a). In support of its characterization of the California tax, the court relied upon *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, *United States* v. *Township of Muskegon*, 355 U.S. 484, and *United States* v. *City of Detroit*, 355 U.S. 466.

Those cases are distinguishable. They upheld a possessory interest tax upon the use of government property by private parties rather than by government employees as in this case. The Michigan tax was imposed upon the use of tax-exempt property by "a private individual, association or corporation in connection with a business conducted for profit * * *" (*United States* v. *City of Detroit, supra*, 355 U.S. at 467-468, n. 1). Thus, the Michigan levy involved the different situation of the imposition of a state tax upon a private contractor's use of federally-owned property in connection with its own commercial activities. The tax was therefore not imposed upon government property as such but on the private contractor's possessory interest in the property.

The tax was upheld because the private contractor was not deemed to be an instrumentality of the United States.[9] Indeed, the Court's rationale in those cases

[9] *Wilson* v. *Cook*, 327 U.S. 474, *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (C.A. 9), certiorari denied, 405 U.S. 933, *People* v. *Naglee*, 1 Cal. 232, *Kaiser* v. *Reid*, 30 Cal. 2d 610, 184 P.2d 879, and *Board of Supervisors* v. *Archer*, 18 Cal. App. 3d 717, upon which appellees rely (Motion to Dismiss or Affirm, pp. 4, 7, 8), are similarly distinguishable because they all involve private contractors who were not federal instrumentalities.

Penn Dairies, Inc. v. *Milk Control Commission*, 318 U.S. 261, cited by the California Court of Appeal (J.S. App. B 68a) and appellees

confirms their inapplicability to the California tax at issue here. The Court stated in *Township of Muskegon* (355 U.S. at 486):

> The case might well be different if the Government had reserved such control over the activities and financial gain of [the private contractor] that it could properly be called a "servant" of the United States in agency terms. But here [the contractor] was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in per-

(Motion to Dismiss or Affirm, p. 5), does not support the imposition of the California tax. There, the Court upheld Pennsylvania's refusal to renew the license of a milk dealer who had sold milk to a military facility at prices lower than the state statutory minimum. In the Court's view, the state regulation imposed no prohibition upon the United States or its officers and the burden imposed was no greater than upon any other private contractor engaged by the government (see 318 U.S. at 270).

Thus, *Penn Dairies* did not involve the federal government's absolute immunity from state taxation upon which this case turns. Moreover, the federal regulation there contained an exception to the general policy of competitive procurement " 'when the price is fixed by federal, state, municipal or other competent legal authority' " (see *id.* at 277). It also contained provisions manifesting a "hands off" policy with respect to state minimum price laws (*id.* at 276, 278). Thus, unlike this case, the federal regulation appears to have contemplated the exercise of state control so as to constitute a waiver of the federal immunity from state regulation that would otherwise have been applicable. Indeed, it was on this basis that the Court subsequently distinguished *Penn Dairies* in *Paul* v. *United States*, 371 U.S. 245, 254-255, in which it invalidated California's minimum price regulation as applied to milk purchased by military installations from appropriated funds.

forming its contracts and maximizing its profits from them.

The Forest Service employees are servants of the United States in the fullest sense of that word, since their activities are under the complete and direct control of their federal employer. Moreover, their occupancy of the housing is subject to a pervasive system of governmental controls directly related to the operation and protection of the national forests. Their assignment to their dwellings is an integral part of their employment and they had no right to remain there unless the federal government so directed. Thus, the Michigan tax upon the possessory use of government property by a private contractor "free to use the property as it thought advantageous" is hardly precedent for a state tax upon the assigned use of government property by government employees under detailed limitations and restrictions.[10] Such a tax, we submit, cannot stand under the Supremacy Clause.

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[10] *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, upon which appellees rely (Motion to Dismiss or Affirm, p. 5), does not support the decision below. There, the Court upheld a state income tax upon the salary of an employee of the Home Owners' Loan Corporation, a federal instrumentality. In upholding the tax, the Court rejected the argument that a state tax upon the income of a federal employee was a tax upon its source so as to impose a burden upon the federal government (see 306 U.S. at 480-487). The decision in that case was presaged by *Helvering* v. *Gerhardt*, 304 U.S. 405, which had held that the salaries of employees of the New York Port Authority were not immune from the federal income tax.

But the state income tax approved in *Graves* is a far cry from the California tax upon the occupancy rights of the Forest Service personnel in this case. The federal government has no further interest in wages paid to its employees, who are free to spend them in any way they choose. Thus, a nondiscriminatory state income tax imposed upon the wages of federal employees does not run afoul of the Supremacy Clause. Here, however, the Forest Service employee's housing is assigned to him as part of his employment and in furtherance of the performance of his duties. Thus, in a very real sense, the California tax is imposed upon the performance of his functions and therefore interferes with the operations of the federal government. See *Mayo* v. *United States, supra*, 319 U.S. at 447.

CONCLUSION

For the reasons stated, the judgments of the court of appeal should be reversed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI of the Constitution provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 13 of the Act of May 23, 1908, 35 Stat. 260, as amended, 16 U.S.C. 500, provides:

> *Payment and evaluation of receipts to State for schools and roads.*
>
> Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided,* That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by

this section shall be based upon the stumpage value of the timber.

3. The Act of September 6, 1966, 80 Stat. 508, 5 U.S.C. 5911 provides:

Quarters and facilities; employees in the United States.

(a) For the purpose of this section—

(1) "Government" means the Government of the United States;

(2) "agency" means an Executive agency, but does not include the Tennessee Valley Authority;

(3) "employee" means an employee of an agency;

(4) "United States" means the several States, the District of Columbia, and the territories and possessions of the United States including the Commonwealth of Puerto Rico;

(5) "quarters" means quarters owned or leased by the Government; and

(6) "facilities" means household furniture and equipment, garage space, utilities, subsistence, and laundry service.

(b) The head of an agency may provide, directly or by contract, an employee stationed in the United States with quarters and facilities, when conditions of employment or of availability of quarters warrant the action.

(c) Rental rates for quarters provided for an employee under subsection (b) of this section or occupied on a rental basis by an employee or member of a uniformed service under any other provision of statute, and charges for facilities made available in connection with the occupancy of the quarters, shall be based on the reasonable value of the quarters and facilities to the employee or member concerned, in the circumstances under which the quarters and facilities are provided, occupied, or made available. The amounts of the rates and charges shall be paid by, or deducted from the pay of, the employee or member of a uniformed service, or otherwise charged against him in accordance with law. The amounts of payroll deductions for the rates and charges shall remain in the applicable appropriation or fund. When payment of the rates and charges is made by other than payroll deductions, the amounts of payment shall be credited to the Government as provided by law.

(d) When, as an incidental service in support of a program of the Government, quarters and facilities are provided by appropriate authority of the Government to an individual other than an employee or member of a uniformed service, the rates and charges therefor shall be determined in accordance with this section. The amounts of payment of the rates and charges shall be credited to the government as provided by law.

(e) The head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Gov-

ernment cannot adequately be protected, otherwise.

(f) The President may prescribe regulations governing the provision, occupancy, and availability of quarters and facilities, the determination of rates and charges therefor, and other related matters, necessary and appropriate to carry out this section. The head of each agency may prescribe regulations, not inconsistent with the regulations of the President, necessary and appropriate to carry out the functions of the agency head under this section.

(g) Subsection (c) of this section does not repeal or modify any provision of statute authorizing the provision of quarters or facilities, either without charge or at rates or charges specifically fixed by statute.

4. Sections 102-104, 107, and 201 of the California Revenue and Taxation Code (West 1970) provide:

§ 102. *Double taxation forbidden*

Nothing in this division shall be construed to permit double taxation.

§ 103. *Property*

"Property" includes all matters and things, real, personal, and mixed, capable of private ownership.

§ 104. *Real estate or real property*

"Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

(b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.

(c) Improvements.

§ 107. *Possessory interests; security for payment of taxes; seizure and sale for delinquent taxes; suit against assessee*

"Possessory interests" means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land.

Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.

In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 to 2919, inclusive, at any time within three years

after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof.

§ 201. *Property taxable*

All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code.

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